

#### 810-27-1-4-.03 Taxable in Another State.

(a) *Taxable in Another State: In General.* Under section 40-27-1, Article IV.2, the taxpayer is subject to the allocation and apportionment provisions of section 40-27-1, Article IV, if it has income from business activity that is taxable both within and without this state. Income from business activity includes business or nonbusiness income. Thus, if a taxpayer has nonbusiness income taxable by one state and business income taxable by another state, the taxpayer shall be taxable in another state within the meaning of section 40-27-1, Article IV.3.

(1) *Applicable tests.* A taxpayer is taxable within another state if it meets either one of two tests: (1) By reason of business activity in another state, the taxpayer is subject to one of the types of taxes specified in section 40-27-1, Article IV.3.(1), namely: A net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax; or (2) By reason of such business activity, another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on the taxpayer.

(b) *Taxable in Another State: When a Corporation is Subject to a Tax Under Section 40-27-1, Article IV.3(1).*

(1) A taxpayer is "subject to" one of the taxes specified in section 40-27-1, Article IV.3(1) if it carries on business activities in a state. Any taxpayer which asserts that it is subject to one of the taxes specified in section 40-27-1, Article IV.3(1) in another state shall furnish to the Commissioner of this state upon his/her request evidence to support that assertion. The Commissioner of this state may request that such evidence include proof that the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in section 40-27-1, Article IV.3(1) in the other state.

**Voluntary tax payment.** If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimal fee for qualification organization or for the privilege of doing business in that state, but

(A) does not actually engage in business activity in that state, or

(B) does actually engage in some business activity not sufficient for nexus and the minimum tax bears no relationship to the taxpayer's business activity within such state, the taxpayer is not "subject to" one of the taxes specified within the meaning of section 40-27-1, Article IV.3(1) and is therefore not "taxable in another state".

EXAMPLE: State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return and pays the

\$50 minimum tax, although it carries on no business activity in State A. Corporation X is not taxable in State A.

(2) The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states which do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in section 40-27-1, Article IV.3(1) which may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is subject to one of the taxes specified in section 40-27-1, Article IV.3(1) in another state.

(i) EXAMPLE: State A requires all nonresident corporations which qualify or register in State A to pay to the Secretary of State an annual license fee or tax for the privilege of doing business in the state regardless of whether the privilege is in fact exercised. The amount paid is determined according to the total authorized capital stock of the corporation; the rates are progressively higher by bracketed amounts. The statute sets a minimum fee of \$50 and a maximum fee of \$500. Failure to pay the tax bars a corporation from utilizing the state courts for enforcement of its rights. State A also imposes a corporation income tax. Nonresident Corporation X is qualified in State A and pays the required fee to the Secretary of State but does not carry on any business activity in State A (although it may utilize the courts of State A). Corporation X is not "taxable" in State A.

(ii) EXAMPLE: Same facts as Example (i) except that Corporation X is subject to and pays the corporation income tax. Payment is prima facie evidence that Corporation X is subject to the net income tax of State A and is "taxable" in State A.

(iii) EXAMPLE: State B requires all nonresident corporations qualified or registered in State B to pay to the Secretary of State an annual permit fee or tax for doing business in the state. The base of the fee or tax is the sum of (1) outstanding capital stock, and (2) surplus and undivided profits. The fee or tax base attributable to State B is determined by a three factor apportionment formula. Nonresident Corporation X which operates a plant in State B, pays the required fee or tax to the Secretary of State. Corporation X is "taxable" in State B.

(iv) EXAMPLE: State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return based upon its business activity in the state but the amount of computed liability is less than the minimum tax. Corporation X pays the minimum tax. Corporation X is subject to State A's corporation franchise tax.

(c) *Taxable in Another State:* When a State has Jurisdiction to Subject a Taxpayer to a Net Income Tax. The second test, that of section 40-27-1, Article IV.3(2), applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U.S.C.A. §§ 381-385. In the case of any "state" as defined in section 40-27-1, Article IV.1(h), other than a state of the United States or political subdivision thereof, the determination of whether the "state" has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that "state". If jurisdiction is otherwise present, that state is not considered as being without jurisdiction by reason of the provisions of a treaty between that state and the United States.

EXAMPLE: Corporation X is actively engaged in manufacturing farm equipment in State A and in foreign country B. Both State A and foreign country B impose a net income tax but foreign country B exempts corporations engaged in manufacturing farm equipment. Corporation X is subject to the jurisdiction of State A and foreign country B.

|            |  |
|------------|--|
| Author:    | Peter M. Petrillo, Jr.   |
| Authority: | 40-2A-7(a)(5) and 40-18-57   |
| History:   | Filed with LRS March 22, 1994. Certification filed with LRS June 10, 1994, effective date July 15, 1994. |